



**DEPARTMENT OF DEFENSE**

**Defense Acquisition Regulations System**

**48 CFR Parts 212, 225, and 252**

**Docket DARS-2022-0020**

**RIN 0750-AL61**

**Defense Federal Acquisition Regulation Supplement: Employment Transparency Regarding Individuals Who Perform Work in the People's Republic of China (DFARS Case 2022-D010)**

**AGENCY:** Defense Acquisition Regulations System, Department of Defense (DoD).

**ACTION:** Final rule.

**SUMMARY:** DoD is adopting as final, without change, an interim rule amending the Defense Federal Acquisition Regulation Supplement (DFARS) to implement a section of the National Defense Authorization Act for Fiscal Year 2022 that requires a disclosure from entities that employ one or more individuals who will perform work in the People's Republic of China.

**DATES:** Effective [INSERT DATE OF PUBLICATION IN THE *FEDERAL REGISTER*].

**FOR FURTHER INFORMATION CONTACT:** Kimberly Bass, telephone 703-717-3446.

**SUPPLEMENTARY INFORMATION:**

**I. Background**

DoD published an interim rule in the Federal Register at 87 FR 52339 on August 25, 2022, to implement section 855 of the

National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2022 (Pub. L. 117-81, 10 U.S.C. 4651 note prec.). Section 855 requires offerors, when submitting a bid or proposal for a covered contract, to disclose their use of workforce and facilities in the People's Republic of China, if they employ one or more individuals who will perform work in the People's Republic of China, unless a national security waiver has been granted. A recurring disclosure is also required for fiscal years 2023 and 2024, for contractors that are covered entities and are a party to one or more covered contracts in each fiscal year, to disclose if the contractor employs one or more individuals who perform work in the People's Republic of China on any such contract. One respondent submitted a public comment in response to the interim rule.

## **II. Discussion and Analysis**

DoD reviewed the public comment in the development of the final rule. No changes were made to the rule as a result of the comment. A discussion of the public comment, which stated support for the rule, is provided as follows:

*Comment:* The respondent supported the disclosure requirement in the interim rule, stating that an outright ban for contracts exceeding the \$5 million threshold would be inappropriate and would not allow a follow-on investigation to reach a determination that protects our national security interests while minimizing the effects on businesses and individuals.

*Response:* DoD acknowledges the support for the rule.

### **III. Applicability to Contracts at or Below the Simplified Acquisition Threshold (SAT) and for Commercial Services and Commercial Products, Including Commercially Available Off-the-Shelf (COTS) Items**

The requirements of section 855 of the NDAA for FY 2022 apply to covered contracts valued in excess of \$5 million, excluding contracts for commercial products or commercial services. Therefore, DoD is not applying the rule to contracts at or below the SAT or to contracts for the acquisition of commercial services or commercial products, including COTS items.

### **IV. Executive Orders 12866 and 13563**

Executive Orders (E.O.s) 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). E.O. 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This is not a significant regulatory action and, therefore, was not subject to review under section 6(b) of E.O. 12866, Regulatory Planning and Review, dated September 30, 1993.

### **V. Congressional Review Act**

As required by the Congressional Review Act (5 U.S.C. 801-808) before an interim or final rule takes effect, DoD will submit a

copy of the interim or final rule with the form, Submission of Federal Rules under the Congressional Review Act, to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States. A major rule under the Congressional Review Act cannot take effect until 60 days after it is published in the **Federal Register**. The Office of Information and Regulatory Affairs has determined that this rule is not a major rule as defined by 5 U.S.C. 804.

## **VI. Regulatory Flexibility Act**

A final regulatory flexibility analysis (FRFA) has been prepared consistent with the Regulatory Flexibility Act, 5 U.S.C. 601, et seq. The FRFA is summarized as follows:

This rule is required to implement section 855 of the National Defense Authorization Act (NDAA) for Fiscal Year 2022 (Pub. L. 117-81, 10 U.S.C. 4651 note prec.). The objective of the rule is to implement section 855 of the NDAA for FY 2022 to require offerors, when submitting a proposal for a covered contract, to disclose their use of workforce and facilities in the People's Republic of China if they employ one or more individuals who will perform work in the People's Republic of China, unless a national security waiver has been granted. A national security waiver may be granted if a determination is made that such disclosure would not be in the interest of national security. Recurring disclosures are required following contract award for contractors that are covered entities for fiscal years 2023 and 2024. The initial and recurring disclosures must include the

total number of individuals who will perform work in the People's Republic of China on the covered contracts and a description of the physical presence of the facility, including the street address, where work on the covered contract will be performed.

There were no significant issues raised by the public comments in response to the initial regulatory flexibility analysis.

Federal Procurement Data System (FPDS) data was analyzed for fiscal years 2019, 2020, and 2021, purchases of supplies or end products and services for which the place of manufacture, place of performance, or country of the product's origin is China; with a value above \$5 million; and excluding commercial services, commercial products, and commercially available off-the-shelf (COTS) items. The FPDS data revealed no awards that met these criteria.

In addition, a data analysis was performed on the North Atlantic Treaty Organization (NATO) Commercial and Government Entity (NCAGE) codes from the NATO Support and Procurement Agency (NSPA) for entities located in the People's Republic of China, including Hong Kong. This review revealed a total of 5,143 entities. There were 4,706 entities in the People's Republic of China with NCAGE codes, and 437 entities in Hong Kong with NCAGE codes. This list of NCAGE codes was compared to any People's Republic of China or Hong Kong NCAGE codes from the FPDS data results for a list of contract awards in fiscal years 2019, 2020 and 2021. Similarly, there were no contract awards

to any unique entities or small business entities meeting the criteria.

There are projected reporting or recordkeeping requirements, and there may be costs to ensure compliance. The contractor's postaward disclosure is required for fiscal years 2023 and 2024, to disclose if a contractor that is a covered entity employs one or more individuals who perform work in the People's Republic of China on a covered contract. The disclosure must include the total number of individuals who will perform work in the People's Republic of China on the contract and a description of the exact street location of the physical presence in China where the work on the contract will be performed.

There are no known alternate approaches to the rule that would meet the objectives of the statute.

## **VII. Paperwork Reduction Act**

This rule contains information collection requirements that have been approved by the Office of Management and Budget under the Paperwork Reduction Act (44 U.S.C. chapter 35). This information collection requirement has been assigned OMB Control Number 0750-0005, entitled Defense Federal Acquisition Regulation Supplement (DFARS), Disclosure of Employment of Individuals Who Work in the People's Republic of China.

### **List of Subjects in 48 CFR Parts 212, 225, and 252**

Government procurement.

**Jennifer D. Johnson,**

*Editor/Publisher, Defense Acquisition Regulations System.*

Accordingly, the interim rule implementing 48 CFR parts 212, 225, and 252, which was published at 87 FR 52339 on August 25, 2022, is adopted as final without change.

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